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May 7, 2008

Ex Parte – Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *Developing a Unified Intercarrier Compensation Regime*, WC Docket No. 01-92

Dear Ms. Dortch:

On May 6, 2008, on behalf of Level 3 Communications, LLC ("Level 3"), I met with Matthew Berry, General Counsel, Joe Palmore, Deputy General Counsel and Chris Killion of the Office of the General Counsel. I provided them with copies of the attached documents, previously filed in this docket. I stated that Level 3 supported the continuation of the $.0007 per minute cap on ISP-bound compensation, together with the mirroring rule which requires ILECs seeking to avail themselves of that cap to offer to terminate traffic at the same rates (*i.e.*, a symmetrical rate at or below the $.0007 per minute cap). Level 3 believes that those rules are supported under Sections 251(b)(5) and 252(d)(2).

As set forth in the attached documents, ISP-bound traffic is interstate in character and falls within the Commission's jurisdiction under Section 201. However, simply because ISP-bound traffic falls within Section 201 does not mean that traffic falls outside of Section 251(b)(5). To the contrary, traffic such as intraMTA wireless and interconnected VoIP falls within the Commission's Section 201 jurisdiction and falls within Section 251(b)(5).

While the Commission may have rate setting authority with respect to intercarrier compensation for traffic that falls both within Sections 201 and 251(b)(5), as set forth in our ex parte dated October 10, 2004, the Commission has the authority to establish pricing rules to govern state commission adjudications of reciprocal compensation rates pursuant to Section 252(d)(2). *See AT&T Corp. v. Iowa Utility Board*, 525 U.S. 366 (1999). As Level 3 will set forth in more detail in a subsequent ex parte, properly considered, the $.0007 rate cap and the mirroring rule are such a pricing rule that establishes a conditional upper limit on what the state determines to be the "reasonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii). Under the *ISP Remand Order*, this rate cap only applies when the ILEC offers to terminate all Section 251(b)(5) traffic at a rate of $.0007 or below, mirroring the rate it will pay for the termination of ISP-bound calls.[1] The level of the cap is justified by the fact that carriers have entered into reciprocal compensation agreements covering ISP-bound traffic at rates of $.0007 and below over the past several years, and by the fact that the ILEC, whose costs form the basis of reciprocal compensation rates under 47 C.F.R. § 51.705, is willing to terminate all other Section 251(b)(5) traffic at the same rate. Thus, at least where the ILEC is willing to terminate traffic at the same rate, the $.0007 cap does not result in rates that are below the "additional costs of terminating such calls." Furthermore, the state is always the entity setting the actual rate, pursuant to Section 252(c), within the limits set by the FCC's pricing rule.

In addition, under the *ISP Remand Order,* where the ILEC is not willing to make the offer to terminate traffic at or below $.0007 (presumably because the ILEC believes its "additional costs" of termination are higher, the cap does not apply and the state adjudicates the reciprocal compensation rate applicable to all traffic, including ISP-bound traffic, without reference to any rate cap. Thus, the rate cap only applies where there are some reliable indicia that the "additional costs" of termination will in fact be below $.0007 per minute.

This view of the $.0007 rate cap and mirroring rule in the *ISP Remand Order* harmonizes the rate cap and the mirroring rule with the terms of Sections 251(b)(5) and 252. Moreover, it does so without limiting the scope of Section 251(b)(5) in ways that may preclude the Commission later from being able to achieve comprehensive intercarrier compensation reform.

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[1] *Intercarrier Compensation for ISP-Bound Traffic,* Order on Remand and Report and Order, 16 FCC Rcd 9151, 9193-4 (¶89)(2001) ("*ISP Remand Order*").

Please let me know if you have any questions.

Sincerely,

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Counsel for Level 3 Communications

cc: Matthew Berry
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September 8, 2004

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68

Dear Ms. Dortch:

The purpose of this letter, which Sprint, Level 3, MCI, and AT&T join, is to express these parties' strong opposition to a proposal by Verizon and BellSouth that the Commission resolve its ISP-bound traffic remand proceeding by ruling that ISP-bound traffic is beyond the scope of § 251(b)(5). As explained more fully below: (i) the construction of section 251(b)(5) advanced by Verizon and BellSouth in the Commission's ISP-bound traffic remand proceeding is entirely unworkable and would produce absurd results that could call into question the Commission's § 251(b)(5) authority over many types of *non*-ISP-bound traffic, (ii) narrowing the scope of § 251(b)(5) in this fashion as a short-term "fix" for ISP-bound traffic could therefore needlessly complicate efforts to adopt urgently-needed comprehensive intercarrier compensation reforms that have broad support within, and are essential to the future health of, the industry, and (iii) for these and other reasons, the Verizon/BellSouth approach would only invite yet another reversal by the court of appeals and is, accordingly, an inferior approach even when the ISP-bound traffic proceeding is considered in isolation.

In their July 20, 2004 "Supplemental White Paper," Verizon and BellSouth advance the theory that § 251(b)(5), which imposes a duty "to establish reciprocal compensation arrangements for the transport and termination of telecommunications," 47 U.S.C. § 251(b)(5), is wholly inapplicable to ISP-bound traffic, because a LEC that delivers calls to an ISP does not "terminate" any traffic. In their view, ISP-bound calls do not "terminate" at the ISP for purposes of § 251(b)(5), but rather "terminate" at the various websites that the ISP's customers visit (some of which may reside on servers beyond the ISP's premises). And, in their view, it is only these further communications to distant websites, and not the "call" that the LEC delivers to the phone number that is dialed, that are relevant to whether the LEC has engaged in "termination," as that term is used in § 251(b)(5).

As detailed below, that cramped construction of § 251(b)(5) runs counter to the statute, the Commission's own rules construing and implementing the statute, and, importantly, the commonsense understanding of the statute that the D.C. Circuit expressed in rejecting the same "no termination" theory of ISP-bound call delivery when the Commission last advanced it in 1999. *See Bell Atlantic Tel. Cos.* v. *FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000). Thus, as a means to bring certainty and final resolution to the issue of compensation for the delivery of ISP-bound traffic, the Verizon/BellSouth approach has little to recommend it. But it is important for the Commission to understand fully the broader implications of that approach.

Any ruling that calls are "terminated" within the scope of § 251(b)(5) only if there are no further communications beyond the premises associated with the called PSTN number could create numerous, indefensible gaps in the scope of § 251(b)(5). Accordingly, if the Commission were to endorse the Verizon/BellSouth argument that § 251(b)(5) does not apply to ISP-bound traffic because "telecommunications" continue to some destination beyond the called party's premises, the Commission could be stripped of § 251(b)(5) authority over a whole range of calls that are characterized by continuing telecommunications. Suppose, for example, that A makes a local call to B. B is not home, and the call is forwarded to the local voice mail server of the LEC that serves B. As in the context of ISP-bound traffic, "telecommunications" continues beyond B to a distant (but intrastate) server. Under Verizon's cramped view of the statute, however, the call from A to B is apparently outside the scope of § 251(b)(5) duties (and hence the Commission's otherwise broad § 251(b)(5) rulemaking authority). Substantial numbers of local and other intrastate calls are already routed to voice mail servers – and unified messaging services – in this fashion. And the emergence of VoIP "Do Not Disturb" and similar features that allow consumers dynamically to manage call inflow and routing can be expected exponentially to increase the volume of calls that trigger communications beyond the called party's premises.

Verizon's and BellSouth's "no termination" theory could produce this absurd result in a whole range of cases where communications – often, intrastate communications – continue beyond the original called party's premises. Proponents of the "no termination" theory could contend, for example, that the Commission has no § 251(b)(5) authority over calls to "leaky" PBXs, calls to credit card verification services, calls forwarded to third party unified messaging services, calls involving two-stage dialing Feature Group A access arrangements (in which a customer makes a local call to establish a connection with a long distance carrier) and calls to "roaming" wireless customers (where the call is first routed to the wireless subscriber's carrier, which then "forwards" the call to the carrier on whose network the subscriber is roaming).

And if the Verizon/BellSouth approach raises concerns for existing categories of circuit-switched traffic, those concerns will only multiply as new services and technologies develop. VoIP services, for example, may base origination of calls on the use of a local number for calls to the VoIP provider, although the subsequent communication is often to distant end users. If the call originates with a Verizon customer and another LEC terminates the initial call to its VoIP service provider customer, then the Verizon/BellSouth theory could exclude such increasingly common communications from the scope of § 251(b)(5). Or, if a LEC terminates a call from the PSTN to a VoIP customer by means of a TDM/IP translation, the LEC will not know if another carrier will be involved in delivering the call to the VoIP customer. As the Commission has recognized, IP-enabled services are increasingly "nomadic," and a "local" call to a "roaming" VoIP customer (who has connected the VoIP device to a remote broadband line) will necessarily involve telecommunications that extend beyond the physical premises associated with the called number. Of course, these are only *foreseeable* potential consequences of the Verizon/BellSouth approach, which may also have a range of entirely unforeseeable and unintended consequences as new technologies employ links of communications in unpredictable ways that not even the participating carriers may understand and anticipate. And it seems certain that mobile, nomadic and more distributed technologies and services will only become more prevalent and that telecommunications are increasingly likely to be "forwarded" to a host of existing and new devices.

It is simply unreasonable to assume that Congress intended for § 251(b)(5) to have such a "checkerboard application," with § 251(b)(5) obligations associated with the shared delivery of calls turning on such irrelevancies as whether the particular call triggered communications beyond the called party's premises. Although there is no way to predict the full implications of the Verizon/BellSouth "no termination" theory of ISP-bound traffic, it is clear that if extended to other traffic, the theory could seriously complicate the Commission's efforts to complete comprehensive intercarrier compensation reform in a timely, efficient and administrable manner. Section 251(b)(5) provides the Commission with the broad authority to address both interstate and *intrastate* traffic that will be necessary to accomplish meaningful reform, and it would be irresponsible in the extreme for the Commission to create unsustainable, self-imposed limits on its authority to insist upon uniform compensation rules for *all* traffic. The possibility of perpetuating differing rate regulation schemes for particular categories of IP-enabled and other calls raises a host of arbitrage and competitive equity issues that the Commission should find very troubling, and the Commission should take great care to ensure that its future authority over intercarrier compensation is not constricted in debilitating ways.

But the Verizon/BellSouth "no termination" theory would not only risk numerous, arbitrary holes in the fabric of § 251(b)(5), it would do so in ways that would create a system that would be impossible to administer, creating endless resource-consuming disputes over which calls are and are not within the scope of § 251(b)(5). Thus, under the voice mail example, it could be argued that some local calls that B's LEC delivered to B would be within the scope of

§ 251(b)(5) duties (the calls that B answered), while others would not (those that were automatically forwarded to voice mail or that B programmed his phone to forward to another location). Parties could be forced to establish burdensome methods to identify and classify calls and to establish separate compensation arrangements (presumably, under state law) to cover gaps in the scope of § 251(b)(5). In this regard, it is important to understand that once a carrier has delivered a call as instructed by its customer, that carrier typically has no way of knowing if the call is then forwarded to other destinations or whether the customer may use the connection to initiate further communications. Indeed, even in the specific context of ISP-bound traffic, the Commission has acknowledged that many ISP communications involve interaction with cached data, and thus do *not*, in fact, continue beyond the ISP's premises. *See, e.g.*, *Southwestern Bell Tel. Co.* v. *FCC*, 153 F.3d 523, 544 (8th Cir. 1998). In any given ISP-bound call, the LECs certainly have no way of knowing whether "telecommunications" continues or not. Thus, while the existence of continuing communications may be relevant to the question of interstate jurisdiction, it cannot be controlling in the context of "termination" under § 251(b)(5), because the existence of the obligation would then turn on facts that are not readily within the knowledge of the contracting parties.

Congress could not have intended, and plainly did not intend, such absurd results. For that and many other reasons, the Commission would shoulder an uncommonly high risk of reversal on appeal if it endorsed the Verizon/BellSouth "no termination" theory. As an initial matter, it bears noting that Verizon and BellSouth urge the Commission to embrace precisely the reasoning that earned the Commission a sharp vacatur and remand in *Bell Atlantic.* Indeed, the Commission made *exactly* the same argument in that case, and the court of appeals properly rejected it. The Commission argued that "although the call from the ISP to an out-of-state website is information service to the end-user, it is *telecommunications* to the ISP, and thus the *telecommunications* cannot be said to terminate at the ISP." *Bell Atlantic*, 206 F.3d at 7 (emphasis added). The court of appeals expressly rejected the argument, and held that "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not 'terminate' at the ISP." *Id.* The court found that the Commission "had not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation," and Verizon and BellSouth have not added any new argument in that regard that the court of appeals has not already rejected.[1]

[1] For example, the Commission relied – as Verizon does here – on cases demonstrating that, under the Commission's jurisdictional end-to-end analysis, such enhanced services do not "terminate" locally for jurisdictional purposes, but are instead interstate services. The court of appeals expressly held that these cases were "not on point." *Bell Atlantic*, 206 F.3d at 6. The court of appeals clearly understood that ISP-bound traffic involves continuing telecommunications, but the Court found that to be irrelevant to real issue: what does "termination" mean in the context of *§ 251(b)(5)*?

Moreover, no matter how the arguments in favor of a "no termination" theory were repackaged the second time around, the reality is that the theory – and its illogical and impractical consequences – simply cannot be reconciled with the relevant statutory language and precedent. Section 252(d)(2) requires reciprocal compensation arrangements for the mutual recovery of the additional costs of terminating "calls" originating on the other carrier's network. In the context of ISP-bound traffic disputes, courts have consistently held that the ISP is "clearly" the "called party," *Bell Atlantic*, 206 F.3d at 6, and the relevant "call" for purposes of § 251(b)(5) is thus the local call from the customer to the ISP. If Congress had wanted to limit the scope of reciprocal compensation to carriers that are last in a string of continuous telecommunications links (or to exclude calls whenever the terminating LEC's customers thereafter employ additional telecommunications links), it could have used language to establish such limitations, but Congress did not do so. Rather, construing the § 251(b)(5) reciprocal compensation duty to apply broadly to calls made by a LEC's customer and delivered to the called party on another carrier's network (and vice versa) is the only interpretation that is consistent with the purpose and language of the two relevant statutory provisions: Section 251(b)(5)'s command that each LEC has a duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications" and Section 252(d)(2)'s instruction that it is "the transport and termination on each carrier's network facilities of *calls* that originate on the network facilities of the other carrier" that is relevant. This construction, unlike the Verizon/BellSouth approach, meets Congress' objective of efficient cost-sharing among carriers that share in the delivery of calls exchanged between customers on different, interconnected networks, and does not create arbitrary exceptions according to what further or additional routing customers may undertake for those calls, through "leaky" PBXs, forwarding of calls, or myriad other arrangements.[2]

In this regard, the Commission has, in other contexts, already recognized that where a call "terminates" does not reflexively turn on continuous paths of telecommunications. For example, in the context of CALEA, the Commission held that "common practice as well as the industry's own technical standards suggest a broader definition [of termination] that recognizes that a call can 'terminate' when it reaches an identifiable stopping point in the network." *Communications Assistance for Law Enforcement Act*, Order on Remand, 17 FCC Rcd. 6896, ¶ 42 (2002). The Commission held that "there can be multiple terminations within a single call." *Id.* ¶ 44. Indeed, the Commission found that even traditional interexchange calls can involve two "terminations" for CALEA purposes – one at the IXC, and a second one at the ultimate called party.[3]

[2] Certain calls that are otherwise within the broad scope of § 251(b)(5) are, of course, currently subject to pre-1996 Act regulations pursuant to the "grandfathering" provisions of § 251(g) and will remain so until the Commission, as § 251(g) contemplates, supercedes those pre-1996 Act regulations.

[3] *Id.* ¶ 45 n.89 ("[w]here a calling party dials the access number of an interexchange carrier and

The Commission's own, prior consistent construction of §§ 251(b)(5) and 252(d)(2) likewise forecloses the Verizon/BellSouth "no termination" approach. The Commission's longstanding rule interpreting the statutory term "termination" unquestionably identifies delivery of a call to an ISP as termination of the ISP-bound call for purposes of § 251(b)(5). That rule defines "termination" for reciprocal compensation purposes as the "delivery of that traffic from [the terminating carrier's] switch to the called party's premises." 47 C.F.R. § 51.701(d). The D.C. Circuit has already recognized that "ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP, which is *clearly* the 'called party.'" *Bell Atlantic*, 206 F.3d at 6 (emphasis added). Numerous courts have agreed that the ISP is properly considered the "called party."[4] The Commission would face an extremely uphill battle if it attempted to repudiate these decisions at this late date, particularly given that the Commission's rule defining "termination" has been upheld, *see Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1241-42 (9th Cir. 1999), and that the Commission has consistently relied upon it, even after the last D.C. Circuit remand. *See, e.g., Cost-Based Terminating Compensation for CMRS Providers*, 18 FCC Rcd. 18441 (2003). Furthermore, any attempt to revise the existing rule in this proceeding would raise substantial notice and comment issues.[5]

Verizon and BellSouth contend that the Commission can disregard these problems with the "no termination" theory simply by recognizing that telecommunications continue to "distant websites" and that ISP-bound traffic therefore "involve[s] continuous interstate telecommunications." Supplemental White Paper at 4-5. But that is the very theory that was rejected in *Bell Atlantic*, and the Commission decisions establishing that ISP-bound communications do not terminate at the ISP's premises for *jurisdictional* purposes that Verizon cites now are the same decisions the Commission unsuccessfully relied upon in *Bell Atlantic*.

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connects through that interexchange carrier to reach a called party ("A" to "X" to "B," where "X" is the interexchange carrier), there are two terminations – first at X (a call-receiving party) and then again at B (the called party). If B then calls a third party ("C") to establish a three-way call, then C is also a termination").

[4] *See, e.g., Southwestern Bell Tel. Co.* v. *Public Utility Comm'n of Texas*, 208 F.3d 475, 485-88 (5th Cir. 2000); *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Oklahoma*, 235 F.3d 493, 499 (10th Cir. 2000); *see also Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 179 F.3d 566, 573-74 (7th Cir. 1999); *Starpower Communications LLC* v. *FCC*, 334 F.3d 1150 (D.C. Cir. 2003); *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1999) ("the score at the moment is 25-0 against . . . [the] Baby Bells").

[5] *See, e.g., Air Transport Ass'n of America* v. *FAA*, 291 F.3d 49, 56 (D.C. Cir. 2002) ("APA rulemaking is required if an interpretation adopts a new position inconsistent with existing regulations" (citation omitted)); *Sprint Corp.* v. *FCC*, 315 F.3d 369 (D.C. Cir. 2003); *National Family Planning and Reproductive Health Ass'n* v. *Sullivan*, 979 F.2d 227, 236 (D.C. Cir. 1992).

The D.C. Circuit has already held that the Commission's jurisdictional rulings based on links of communications do *not* provide an answer to where a call "terminates" for purposes of § 251(b)(5). As the D.C. Circuit noted, "an ISP appears . . . no different from many businesses, such as 'pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies,' which use a variety of communication services" that may extend beyond their premises, 206 F.3d at 7. The Court of Appeals noted that although "the ISP's origination of telecommunication is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service)," this does "not imply that the original communication does not 'terminate' at the ISP." *Id.* Again, "termination" for purposes of § 251(b)(5) need not follow mechanically from jurisdictional analysis, never has done so, and could not rationally do so. Indeed, the ESP exemption – applicable to ISP-bound traffic calls – is flatly inconsistent with a rule that compensation follows jurisdiction. *Cf.* Supplemental White Paper at 7; *see also Bell Atlantic*, 206 F.3d at 8 ("[t]his classification of ESPs is something of an embarrassment to the Commission's present ruling" that 251(b)(5) compensation must follow jurisdiction).

In short, the "no termination" theory of ISP-bound traffic is neither a sustainable resolution of the ISP-bound traffic remand proceeding nor a sensible short-term fix in light of the Commission's broader responsibilities and institutional interests in completing comprehensive intercarrier compensation reform.

Respectfully submitted,

/s/ David L. Lawson

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
Intercarrier Compensation For ISP-Bound Traffic	)	CC Docket No. 99-68

SECTIONS 251(B)(5) AND 252(D)(2) GOVERN ISP-BOUND TRAFFIC AND ARE NOT LIMITED TO "LOCAL" TERMINATION

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June 23, 2004

INTRODUCTION AND SUMMARY

Level 3 Communications LLC ("Level 3") hereby responds to arguments presented by Verizon and BellSouth Corporation in Section I of the *ex parte* filing they submitted on May 17, 2004.[1] In particular, Level 3 addresses the erroneous contention that Sections 251(b)(5) and 252(d)(2) of the Communications Act ("Act") do not apply to the exchange of ISP-bound traffic between LECs.[2]

Verizon and BellSouth ask the Commission to abandon the statutory analysis of Sections 251(b)(5) and 251(g) adopted in the *ISP Remand Order*,[3] and to re-adopt the view – expressly repudiated by the *ISP Remand Order* – that Section 251(b)(5) only applies to "local" telecommunications traffic. The Commission's reasons for repudiating the "local"/"long distance" distinction in this context three years ago remain valid. Most importantly, the express language of Section 251(b)(5) applies on its face to *all* telecommunications traffic, not just "local" telecommunications traffic.

The D.C. Circuit's decision in *WorldCom v. FCC* underscores that Section 251(b)(5) means what it says.[4] *WorldCom v. FCC* involved a challenge to the Commission's claim that it could make new rules governing intercarrier compensation for ISP-bound traffic because such traffic purportedly fell within the term "information

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1 See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Internet-Bound Traffic Is Not Compensable Under Section 251(b)(5) and 252(d)(2) (*ex parte* submission of Verizon and BellSouth Corporation) (filed May 17, 2004) ("Verizon/BellSouth *Ex Parte*").

2 Level 3 will respond separately to the remaining arguments raised by Verizon and BellSouth, including the argument that ISP-bound traffic constitutes "exchange access."

3 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) ("*ISP Remand Order*").

4 *WorldCom v. FCC*, 288 F.3d 429 (2002).

access" in Section 251(g), and therefore *not* within Section 251(b)(5). In reversing, the D.C. Circuit held that Section 251(g) authorizes only "continued enforcement" of pre-1996 Act requirements, and pointed out that there *is no such requirement* as to intercarrier compensation for ISP-bound calls[5] – precisely as the Commission itself had found in the *ISP Declaratory Ruling*.[6] In short, because Section 251(b)(5) *on its face* covers ISP-bound traffic, because there are *no* relevant pre-1996 Act rules, and because the Commission has *no* authority to promulgate new rules inconsistent with Section 251(b)(5), it is plain that intercarrier compensation for ISP-bound traffic is governed solely by Section 251(b)(5).

The Act is not a marionette that may be made to dance to the tune of Verizon's and BellSouth's parochial interests, while broader interests go begging. Here, bending the plain language of Section 251(b)(5) to read a "local"/"long distance" distinction into the statute could cripple unified intercarrier compensation reform by fracturing the Commission's statutory authority. That would undercut the Commission's ability to achieve *comprehensive* intercarrier compensation reform, particularly with respect to circuit-switched communications.

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5 *Id.* at 433.

6 *See Implementation of Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Propose Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3695 (¶ 9) (1999) ("*ISP Declaratory Ruling*"), *rev'd and remanded sub nom. Bell Atlantic v. FCC*, 206 F.3d 1, 2 (D.C. Cir. 2000).

I. VERIZON'S AND BELLSOUTH'S THEORY THAT SECTION 251(B)(5) IS LIMITED TO "LOCAL" TERMINATION IS FORECLOSED BY THE COMMISSION'S *ISP REMAND ORDER* AND THE D.C. CIRCUIT'S *WORLDCOM* DECISION.

Verizon and BellSouth argue that "§ 251(b)(5) applies only to traffic that originates on the network of one local exchange carrier and terminates on the network of another local exchange carrier within the same local calling area."[7] That argument is foreclosed by the Commission's *ISP Remand Order* and the D.C. Circuit's decision in *WorldCom*.

A. Section 251(b)(5) Governs *All* Telecommunications Traffic Exchanged Between LECs and *All* Other Telecommunications Carriers, Not Just "Local" Traffic Exchanged Between LECs or Between a LEC and a CMRS Carrier.

1. Section 251(b)(5) is Not Limited to "Local" Traffic.

Verizon and BellSouth claim that the Commission, in the *ISP Remand Order*, "did not *repudiate* the analysis on which it had relied in the *Local Competition Order*"[8] to find that Section 251(b)(5) applies only to "local" traffic.[9] Verizon's and BellSouth's revisionist assertion is simply wrong, and is contradicted by the express terms of the *ISP Remand Order*.

In its 1996 *Local Competition Order*, the Commission found that Section 251(b)(5) applies only to local telecommunications traffic.[10] The Commission applied

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7 Verizon/BellSouth *Ex Parte* at 26.

8 Verizon/BellSouth *Ex Parte* at 25 (emphasis in original).

9 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

10 *See id.*, 11 FCC Rcd at 16013 (¶ 1034); *see also ISP Declaratory Ruling*, 14 FCC Rcd at 3693 (¶ 7).

that rule to ISP-bound traffic in its *ISP Declaratory Ruling*, which relied on the traditional "end-to-end" jurisdictional analysis to conclude that ISP-bound traffic is not "local" because "a substantial portion of Internet traffic involves accessing interstate or foreign websites."[11] The D.C. Circuit reversed and remanded that decision on the ground that the Commission had failed to "provide an explanation why this [end-to-end jurisdictional analysis] is relevant to discerning whether a call to an ISP" should, for intercarrier compensation purposes, "fit within the local call model of two collaborating LECs or the long-distance model of a long-distance carrier collaborating with two LECs."[12]

In the resulting *ISP Remand Order*, the Commission reconsidered whether Section 251(b)(5), by its terms, applies to ISP-bound communications.[13] The Commission repudiated its earlier ruling that the provision is limited to the termination of "local" telecommunications, finding that it had "*erred* in focusing on the nature of the service (*i.e.*, local or long distance) . . . for purposes of interpreting the relevant scope of section 251(b)(5)," rather than looking to the language of the statute itself.[14] Specifically, the Commission found that, "[o]n its face," Section 251(b)(5) requires "local exchange carriers . . . to establish reciprocal compensation arrangements for the transport and termination of *all* 'telecommunications' they exchange with another telecommunications carrier, without exception."[15] The Commission emphasized that, "[u]nless subject to

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11 *See ISP Declaratory Ruling*, 14 FCC Rcd at 3701-02 (¶ 1); *Bell Atlantic*, 206 F.3d at 2.

12 *Bell Atlantic*, 206 F.3d at 5.

13 *See ISP Remand Order*, 16 FCC Rcd at 9152 (¶ 1).

14 *Id.*, at 9164 (¶ 26) (emphasis added).

15 *Id.*, at 9165-66 (¶ 31) (emphasis in original).

further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of *all* telecommunications traffic – *i.e.*, whenever a local exchange carrier exchanges telecommunications traffic with another carrier."[16]

Of course, the Commission went on to find that Section 251(b)(5) *is* "subject to further limitation" – specifically, that certain types of traffic enumerated in Section 251(g) are "carve[d]-out" of Section 251(b)(5).[17] That conclusion did not, however, affect the Commission's determination as to the scope of Section 251(b)(5) absent the "limitation" that the Commission believed to be imposed by Section 251(g).

As further discussed *infra* in Part I.B., the D.C. Circuit's *WorldCom* decision rejected the Commission's view that Section 251(g) contains a "limitation" on Section 251(b)(5).[18] Specifically, the court found that Section 251(g) permits only "continued enforcement" of pre-1996 Act requirements, rather than conferring independent authority on the Commission to adopt new intercarrier compensation rules inconsistent with Section 251(b)(5).[19] The D.C. Circuit did *not*, however, cast any doubt on the Commission's express finding that Section 251(b)(5) applies, "on its face," to *all* telecommunications traffic, whether local or otherwise.

In short, the *ISP Remand Order* reconciled Sections 251(b)(5) and 251(g): traffic that does *not* fall within Section 251(g) is governed by Section 251(b)(5).[20] And

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16 *Id.*, at 9166 (¶ 32) (emphasis in original).

17 *Id.*, at 9169 (¶ 38).

18 *See WorldCom*, 288 F.3d at 433-34.

19 *Id.*

20 *See ISP Remand Order*, 16 FCC Rcd at 9169-70 (¶ 39). Moreover, in its *WorldCom* brief to the D.C. Circuit, the Commission itself acknowledged that any Section 251(g) "carve-out" of "the categories of service listed in that section" from the "'telecommunications' covered by section 251(b)(5)" could be effective only "*until*

WorldCom clarified that ISP-bound traffic does not fall within Section 251(g), because there are no relevant pre-1996 Act rules that Section 251(g) could possibly preserve. Accordingly, Verizon's and BellSouth's claim that the Commission has not repudiated its initial position that Section 251(b)(5) applies only to "local" traffic is inconsistent with the *ISP Remand Order*.

The changes adopted by the Commission in the *ISP Remand Order* further demonstrate that the *Order* rejected the Commission's earlier view that Section 251(b)(5) applies only to "local" termination of telecommunications. In the *ISP Remand Order*, the Commission amended its reciprocal compensation rules (47 C.F.R. Part 51, Subpart H) in two key respects. First, it eliminated the word "local" in each place it appeared. Second, the Commission expanded the scope of "telecommunications traffic" under the reciprocal compensation rules to cover *all* "telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider" except for traffic "that is interstate or intrastate exchange access, information access, or exchange services for such access"[21] – the specific categories of traffic enumerated in Section 251(g).

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superseding regulations that impose reciprocal compensation obligations are adopted." Brief for the FCC at 28 (emphasis added), *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) (No. 01-1218) ("FCC Brief"). The Commission thereby underscored that Section 251(b)(5) does apply to traffic not within (or no longer within) Section 251(g), including traffic that is not terminated in the same local calling area from which it originated. Of course, as Level 3 explained in greater detail in its reply comments in support of its petition for forbearance, the Commission can also terminate the application of Section 251(g) through forbearance pursuant to Section 10. *See Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b)*, Reply Comments of Level 3 Communications LLC, WC Docket No. 03-266 at 4-5, 12-36 (filed March 31, 2004).

21 47 C.F.R. § 51.701(b)(1).

The Commission's expansion of the term "telecommunications traffic" following the *ISP Remand Order* to cover all but the specific categories of traffic enumerated in Section 251(g) cannot be squared with Verizon's and BellSouth's argument that "interstate" traffic falls outside Section 251(b)(5).[22] Had the Commission concluded – as the ILECs urge – that Section 251(i) somehow excludes interstate traffic not within Section 251(g) from Section 251(b)(5)'s reciprocal compensation regime, the Commission would have taken care to exclude such traffic from its amended definition of "telecommunications traffic" subject to reciprocal compensation. As noted above, however, the Commission did not do so, but instead excluded only the Section 251(g) categories.

Finally, contrary to Verizon's and BellSouth's claims,[23] the *ISP Remand Order*'s construction of Sections 251(b)(5) and 251(g) dovetails with the legislative history of the Telecommunications Act of 1996 ("1996 Act"). In particular, consistent with the language of the Conference Report describing the Senate version of the 1996 Act, the *ISP Remand Order*'s construction of Sections 251(b)(5) and 251(g) did *not* "affect the Commission's access charge rules" as they stood on the date of enactment of the 1996 Act.[24] Rather, that construction acknowledged – as expressly contemplated by the Joint

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22 *See* Verizon/BellSouth *Ex Parte* at 31.

23 *See* Verizon/BellSouth *Ex Parte* at 28.

24 *See* H.R. Conf. Rep. No. 104-458, at 117 (1996) (Joint Explanatory Statement of the Committee of Conference)("Joint Statement"). Verizon and BellSouth also make much of the language in the Joint Statement, which described what was Section 251(a) of the Senate-passed version of S.652, stating, "[t]he obligations and procedures prescribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications carriers under section 201 of the Communications Act for the purpose of providing interexchange service, and nothing in this section is intended to affect the Commissions [sic] access charge rules." However, the bill language was more precise, providing, "Nothing in this section shall affect the Commission's

Statement[25] – that Section 251(g)'s preservation of the existing access rules was temporary, lasting only until the Commission issued superseding regulations[26] (or until it forbore from enforcing the existing rules pursuant to Section 10).

2. The Terms "Originate" and "Terminate" in Sections 252(d)(2) and 251(b)(5) Do Not Exclude Traffic Delivered to Non-"Local" End Points.

In straining to argue that the Commission's explicit statement that it had "erred in focusing on the nature of the service (*i.e.*, local or long distance)" was not a repudiation of its earlier position,[27] Verizon and BellSouth contend that the phrases "*termination* of telecommunications" in Section 251(b)(5) and "*termination* on each carrier's network facilities of calls that *originate* on the network facilities of the other carrier" in Section 252(d)(2)(A)(i) could only apply "to traffic that originates on the facilities of one carrier and terminates on the facilities of a second carrier *within the same local calling area*."[28] No support exists for this argument in the language or legislative history of Sections 251(b)(5) and 252(d)(2)(A)(i).

Verizon and BellSouth add words that do not appear in Sections 251 or 252: "*within the same local calling area*." To the contrary, Sections 251 and 252 contain no

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interexchange-to-local exchange access charge rules for local exchange carriers or interexchange carriers in effect on the date of enactment." S.652, 104th Cong. § 251(k) (as passed by the Senate and engrossed, June 15, 1995). Notably, however, there was no rule governing the exchange of ISP-bound traffic between LECs that would have been preserved. This language later evolved into Section 251(g), as enacted.

25 *See id.* at 123 ("When the Commission promulgates its new regulations, the conferees expect that the Commission will explicitly identify those parts of the interim restrictions and obligations that it is superseding.").

26 *See supra* n.20.

27 *ISP Remand Order*, 16 FCC Rcd at 9164 (¶ 26).

28 Verizon/BellSouth *Ex Parte* at 26-27 (emphasis added).

limitation on the geographic scope of calls; they refer simply to the "transport and termination of telecommunications" and the "transport and termination . . . of calls."[29] Moreover, as AT&T pointed out in a recent *ex parte* filing, Congress chose the broad statutory term "telecommunications" and *not* the much narrower term "telephone exchange service" to describe the scope of LECs' termination obligations under Section 251(b)(5).[30] By taking the opposite approach, Congress could have limited Section 251(b)(5) to the transport and termination of communications originating within the same LEC local service area – but it did not.[31]

3. Section 251(b)(5) Applies to Telecommunications Exchanged Between All Telecommunications Carriers.

Verizon and BellSouth also argue that the Section 251(b)(5) reciprocal compensation regime applies only to telecommunications traffic exchanged "*between*

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29 47 U.S.C. §§ 251(b)(5), 252(d)(2)(A)(i).

30 *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Section 251(b)(5) Applies to ISP-Bound Traffic, at 2 (*ex parte* submission of AT&T Corp.) (filed May 28, 2004).

31 Verizon's and BellSouth's claim that Section 251(b)(5) applies only to "local" traffic also ignores the interplay between Sections 251(b)(5) and 251(g). In areas where a pre-1996 rule existed and has not been superseded, that pre-existing rule applies and Section 251(b)(5) does not. *See ISP Remand Order*, 16 FCC Rcd at 9169 (¶ 39). So, for example, when a subscriber places a typical pre-subscribed "telephone toll service" call, as defined in Section 3(48), 47 U.S.C. § 153(48), the origination or termination of that call over a LEC network is "exchange access," as expressly defined in Section 3(16) of the Act. 47 U.S.C. § 153(16). "Exchange access" is a Section 251(g) category for which a pre-1996 rule existed. Accordingly, Section 251(b)(5) should not apply to such calls unless and until the Commission issues superseding regulations. Clearly, however, no comparable interplay between Sections 251(b)(5) and 251(g) exists for "interstate" calls, because they do not constitute a Section 251(g) category.

LECs."[32] That claim is inconsistent with both the plain language of the provision and the legislative history.

As discussed above, Section 251(b)(5) applies by its terms to the transport and termination of "telecommunications." As the Commission observed in the *ISP Remand Order*, on its face, the language covers the transport and termination of *all* telecommunications, not just telecommunications exchanged with a LEC.[33] Moreover, in the *Local Competition Order*, this Commission expressly held that LEC-CMRS arrangements fell within Section 251(b)(5) because all CMRS providers "offer telecommunications."[34] Under the Act's definitions, a CMRS provider is not a LEC, except when the FCC expressly finds that a CMRS provider should be considered a LEC – which the FCC has never done.[35]

Furthermore, the Joint Statement confirms that Section 251(b)(5), like the rest of Section 251(b), identifies duties that all LECs (incumbent or competitive) owe to *all* other telecommunications carriers, not just to other LECs. The Conferees stated that "the duties imposed under new section 251(b) make sense only in the context of a specific request *from another telecommunications carrier or any other person* who actually seeks to connect with or provide services using the LEC's network."[36] This sentence – with its references to connections with "another telecommunications carrier or any other person" – would be nonsensical if the obligations of Section 251(b)(5) applied only to other

32 Verizon/BellSouth *Ex Parte* at 26 (emphasis in original).

33 *ISP Remand Order*, 16 FCC Rcd at 9165-66 (¶ 31).

34 *Local Competition Order*, 11 FCC Rcd at 15997.

35 47 U.S.C. § 153(26)(definition of "local exchange carrier" excludes CMRS, unless included by the Commission).

36 Joint Statement at 121 (emphasis added).

LECs. Congress clearly contemplated that Section 251(b)(5)'s duties, including reciprocal compensation, extended beyond LEC-to-LEC communications.

4. One-Way Traffic Flows Fall Within Section 251(b)(5).

Verizon and BellSouth maintain that ISP-bound calls are not subject to "*reciprocal* compensation arrangements" because the traffic flow occurs in one direction only.[37] Notably, Verizon and BellSouth ignore Commission rulings and court decisions with respect to reciprocal compensation for analogous one-way paging traffic, where calls originate on the PSTN and terminate via the paging carrier.[38] In the *Local Competition Order*, for instance, the Commission made clear that LECs "are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks."[39] The Commission addressed the issue again in *TSR Wireless*. In that proceeding, the defendants argued that "the reciprocal compensation rules should not apply to one-way paging carriers because only one of the carriers, in this case, the paging carrier, receives termination compensation."[40] The Commission found that its reciprocal compensation rules "draw[] no distinction between one-way and two-way carriers."[41]

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37 Verizon/BellSouth *Ex Parte* at 41 (emphasis in original).

38 *See, e.g., TSR Wireless, LLC v. U.S. West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd. 11166 (2000) ("*TSR Wireless*"); *Local Competition Order*, 11 FCC Rcd at 15517 (¶ 34); Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau, to Keith Davis, Southwestern Bell Telephone, DA 97-2726 (Dec. 30, 1997).

39 *Local Competition Order*, 11 FCC Rcd. at 15997 (¶ 1008).

40 *TSR Wireless*, 15 FCC Rcd. at 11177 (¶ 20).

41 *Id.*, 15 FCC Rcd at 11178 (¶ 21).

The United States Court of Appeals for the Ninth Circuit, in *Pacific Bell v. Cook Telecom Inc.*, similarly rejected arguments – identical to those raised by Verizon and BellSouth – that the Act precludes payment of reciprocal compensation when calls are terminated in one direction only.[42] These decisions cannot be distinguished. Just as a LEC must pay reciprocal compensation to a paging carrier, so must it compensate a carrier terminating a call to an ISP providing Internet access.

Remarkably, Verizon and BellSouth also argue that the direction of the net bit flow in an ISP-bound communication should somehow affect intercarrier compensation.[43] That makes no sense. It is equivalent to arguing that the Commission should base intercarrier compensation for voice traffic on the share of time the calling party spends listening rather than speaking. The Commission has never adopted rules that change the compensation regime for calls to audiotex services – or for calls to particularly chatty acquaintances. Nor should it. Notwithstanding Verizon's and BellSouth's suggestion to the contrary, Congress certainly did not intend for the FCC to base its intercarrier compensation rules on net bit flow or net minutes listening versus talking.

5. The Commission Cannot Simply Change Its Mind as to the Proper Interpretation of Sections 251(b)(5) and 251(g).

By urging the Commission to re-adopt its discarded distinction between local and long-distance traffic for purposes of applying Section 251(b)(5), Verizon and BellSouth ask the Commission to reverse course. But a decision to abandon the current view of Section 251(b)(5) and revert to an approach that failed in the past will lead to intense

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42 *See Pacific Bell v. Cook Telecom, Inc.*, 197 F.3d 1236, 1242-1244 (9th Cir. 1999).

43 *See* Verizon/BellSouth *Ex Parte* at 42-43.

judicial scrutiny, particularly since the Commission itself deemed its past approach a "mistake" that "created unnecessary ambiguities."[44]

"It is well-established," according to a long line of Supreme Court and appellate decisions, "that an agency may not depart from established precedent without announcing a principled reason for such a reversal."[45] The Supreme Court confirmed this rule most forcefully in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*,[46] where it rejected a decision from the National Highway Traffic Safety Administration (NHTSA) to eliminate a standard that would have required manufacturers to install passive restraint systems in all new cars. The Court explained that federal agencies generally act with broad discretion and that an agency's discretion can include a decision not to act. The Court held, however, that revoking a prior decision "is substantially different than a failure to act [because] [r]evocation constitutes a reversal of the agency's former views as to the proper course."[47] Whenever an agency abandons its existing standards, the Court held, it "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[48] Concluding that the NHTSA had not adequately explained its departure from the passive restraint standard and that it had failed to

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44 *ISP Remand Order*, 16 FCC Rcd at 9173 (¶ 46).

45 *Fertilizer Inst. v. Browner*, 163 F.3d 774, 778 (3rd Cir. 1998).

46 463 U.S. 29 (1983).

47 *Id.* at 41; *see also Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 41 (1st Cir. 1989) ("Unless an agency either follows or consciously changes the rules developed in its precedent, those subject to the agency's authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action.").

48 *State Farm*, 463 U.S. at 43 (internal quotations omitted).

consider alternative standards, the Court found that the agency's rescission of the standard was arbitrary and capricious.

Under the *State Farm* rule, the Commission is not free to discard its current approach to Sections 251(b)(5) and 251(g), as Verizon and BellSouth suggest. The Commission may rescind its current approach and re-adopt its past policy *only* if it could justify the rescission through a reasoned analysis supported by record evidence. Such a reasoned analysis is likely impossible in this case, however, as both the Commission and the D.C. Circuit have rejected past efforts to inject a "local"/"long-distance" distinction into interpretations of Section 251(b)(5).[49] Accordingly, *State Farm* bars the Commission from undertaking the wholesale policy switch that Verizon and BellSouth advocate.

B. Section 251(g) Establishes Only a Temporary Exclusion from Section 251(b)(5), and Only if There Was a Pre-1996 Act Rule Governing Intercarrier Compensation.

As briefly set forth in Part I.A.1., the D.C. Circuit's *WorldCom* decision squarely rejected the Commission's earlier view that Section 251(g) "carves out" certain traffic from Section 251(b)(5), and that the Commission retains authority to regulate that traffic pursuant to Sections 251(i) and Section 201.[50] The court held that because Section 251(g) "is worded simply as a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act, we find the Commission's reliance on § 251(g) precluded."[51] That

49 *See supra* Part I.A.1.

50 *See ISP Remand Order*, 16 FCC Rcd at 9169, 9174-75 (¶¶ 38, 48-51) (emphasis added).

51 *WorldCom*, 288 F.3d at 430.

holding – coupled with the Commission's earlier finding in the *ISP Declaratory Ruling* that there was no pre-1996 Act rule governing intercarrier compensation for ISP-bound traffic[52] – makes clear that the Commission has no authority to depart from Section 251(b)(5) and impose new intercarrier compensation regulations on ISP-bound traffic.

1. There Is No Pre-1996 Act Rule Governing Intercarrier Compensation for ISP-Bound Traffic.

In the *ISP Declaratory Ruling*, the Commission stated unambiguously that "[t]he Commission *has no rule* governing inter-carrier compensation for ISP-bound traffic."[53] In its *ISP Remand Order* and its briefs to the D.C. Circuit in *WorldCom,* the Commission never suggested anything to the contrary. And, in the *WorldCom* decision, the D.C. Circuit noted that "it seems uncontested – and the Commission declared in the [*ISP Declaratory Ruling*] – that there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."[54] The court emphasized that the Commission did not "point to any pre-Act, federally created obligation for LECs to interconnect to each other for ISP-bound calls."[55]

The *WorldCom* court also rebuffed the Commission's contention that "pre-existing LEC obligations to provide interstate access for ISPs" could justify removing ISP-bound traffic from the scope of Section 251(b)(5).[56] The court explained that Section 251(g) "speaks only of services provided 'to interexchange carriers and information

52 *See ISP Declaratory Ruling*, 14 FCC Rcd at 3695 (¶ 9).

53 *Id.* (emphasis added); *see also id.*, 14 FCC Rcd at 3690 (¶1) (discussing "the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic").

54 *WorldCom*, 288 F.3d at 433 (emphasis in original).

55 *Id.*

56 *Id.*

service providers'; LECs' services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP."[57] In other words, pre-existing rules regarding services *to* ISPs cannot justify exempting the exchange of traffic *between* LECs from Section 251(b)(5). *WorldCom* thus forecloses the Commission from now claiming that rules governing compensation to be paid by ISPs as end users are rules governing *intercarrier* compensation for ISP-bound traffic.[58]

2. Absent a Pre-1996 Act Rule, The Commission Cannot Subject ISP-Bound Traffic to An Intercarrier Compensation Regime Outside the Scope of Section 251(b)(5).

As discussed above, the D.C. Circuit's decision in *WorldCom* can be distilled to a single core holding: absent a pre-1996 Act rule governing intercarrier compensation for ISP-bound traffic, Section 251(g) provides no basis for Commission rulemaking. Nor can the Commission turn to other provisions of the Act – such as Section 251(i) and, through that section, Section 201 – as sources of authority to promulgate new intercarrier compensation rules for ISP-bound traffic inconsistent with Section 251(b)(5).[59]

The Commission's *ISP Remand Order* cannot be read to establish Section 251(i) as a source of authority for its ISP-bound rules independent of Section 251(g). To the contrary, the Commission there did *not* rely on Section 251(i) at all, as it explained in its briefing to the D.C. Circuit in *WorldCom*:

> [S]ection 251(i) has no direct role in the Commission's interpretation of section 251(b)(5) – which rests instead upon a

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57 *Id.* at 433-434.

58 *Cf., e.g., Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[O]nce a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.").

59 Section 251(i) states that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201." 47 U.S.C. § 251(i).

> reading of sections 251(b)(5) and 251(g) in light of statutory goals. The Commission relies on section 251(i) solely for its continued authority to regulate Internet-bound traffic (which *otherwise* is exempted from section 251(b)(5) pursuant to section 251(g)) under its general regulatory jurisdiction over interstate communications set forth in section 201.[60]

The Commission's brief acknowledged that Section 251(i) cannot *remove* any traffic from the scope of Section 251(b)(5); it merely provides "authority to regulate" traffic that is not covered by that provision.

In sum, in light of the D.C. Circuit's decision in *WorldCom* and the Commission's own prior decisions, neither Section 251(g) nor Section 201 (through Section 251(i)) establishes limits on Section 251(b)(5)'s applicability to non-local traffic or authorizes rules for intercarrier compensation for ISP-bound traffic outside of Section 251(b)(5).

II. READING SECTION 251(G) TO ESTABLISH PERMANENT EXEMPTIONS FROM SECTION 251(B)(5) COULD CRIPPLE UNIFIED INTERCARRIER COMPENSATION REFORM.

Accepting Verizon's and BellSouth's invitation to reverse course yet again and limit Section 251(b)(5) to "local" traffic could cripple the Commission's efforts to achieve unified intercarrier compensation reform. Under the Commission's current view, Section 251(b)(5) establishes the statutory intercarrier compensation mechanism applicable to all telecommunications traffic "without exception,"[61] pending Commission rulemaking pursuant to Section 251(g) to supersede pre-existing exchange access compensation mechanisms.[62] Section 251(b)(5)'s unitary approach provides the Commission authority to undertake unified intercarrier compensation reform.

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60 FCC Brief at 44.

61 *ISP Remand Order*, 16 FCC Rcd at 9166 (¶ 31).

62 The Commission's rulemaking authority under Section 251(g) has no bearing on its obligation to forbear under Section 10. Thus, the Commission can act on Level 3's

In the past, at least some ILECs have agreed with this interpretation of the manner in which Sections 251(b)(5) and 251(g) authorize the creation of a unified intercarrier compensation mechanism. As Qwest stated in its comments in response to the Commission's *Intercarrier Compensation NPRM*, for instance, "[o]ver time, as the FCC exercises its authority to 'supersede[] by regulation[]' the grandfathering provisions of section 251(g), the class of traffic subject to section 251(b)(5) may increase in size."[63] Likewise, in its comments in the same proceeding, SBC argued that "the Commission has authority under Section 251(b)(5) and 251(g)" to implement new intercarrier compensation mechanisms "for interstate and intrastate traffic."[64]

Verizon and BellSouth nonetheless argue that the Commission's current interpretation of Sections 251(b)(5) and 251(g) *threatens* unified intercarrier compensation reform because states adjudicate arbitrations pursuant to Section 252.[65] Verizon's and BellSouth's concerns are misplaced. Even when Section 251(b)(5)

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pending petition for forbearance from application of access charges to certain IP-enabled communications without opening a rulemaking proceeding. *See Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b),* WC Docket No. 03-266 (filed Dec. 23 2003).

63 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of Qwest Communications International, Inc., at 41 (filed Aug. 21, 1001).

64 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of SBC Communications Inc., at 39 (filed Aug. 21, 2001). *See also Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Reply Comments of SBC Communications Inc., at 26-27 (filed Nov. 5, 2001) ("As the Commission recently concluded in the *ISP Intercarrier Compensation Order*, Section 251(b)(5) applies on its face to the transport and termination of *all* telecommunications traffic without exception. To the extent Section 251(g) exempts certain categories of telecommunications services from automatic application of the reciprocal compensation obligations of Section 251(b)(5), it merely gives the Commission flexibility to transition from existing access regimes to a new regulatory regime . . . .") (internal footnotes omitted).

65 *See* Verizon/BellSouth *Ex Parte* at 31.

ultimately applies to all telecommunications traffic (*i.e.*, after the Commission, under Section 251(g), has superseded entirely its pre-existing access rules in favor of Section 251(b)(5)), the Commission will retain its authority to establish national rules governing the interpretation and implementation of Section 251(b)(5).[66] States are required to conduct all arbitrations pursuant to those rules. This is a coherent, unified intercarrier compensation system under which some responsibilities (including rulemaking) are discharged exclusively by the FCC, while other responsibilities (such as adjudication of the application of such rules) are discharged by the states. This is a perfectly rational system, and one consistent with the jurisdictional assignment of responsibilities with respect to all other parts of Section 251(a)-(c).

In fact, it is Verizon's and BellSouth's crabbed interpretation of Section 251(b)(5) – confining its scope to "local" telecommunications traffic – that would fracture the Commission's authority over intercarrier compensation and eliminate the mechanism providing for a smooth transition to a uniform regime. Under the Verizon and BellSouth approach, the exchange of interstate long distance traffic would be governed permanently by the FCC's access charge rules pursuant to Section 201, and the exchange of intrastate long distance traffic would be governed by state access charge rules. That fragmented system would frustrate the implementation of a single, unified approach to intercarrier compensation.

Even under Verizon's and BellSouth's view of the Act, the Commission could, of course, still adopt a uniform intercarrier compensation regime if it were to find it

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66 *See AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999) (noting that "the 1996 Act entrusts state commissions with the job of approving interconnection agreements," although it "do[es] not logically preclude the [FCC's] issuance of rules to guide the state-commission judgments") (original alterations omitted).

impossible to continue to separate traffic, including circuit-switched traffic, into interstate and intrastate components. As the Commission has recently reaffirmed, state regulators may only exercise jurisdiction over communications services that are either "purely intrastate" or that may be "practically and economically" separated into interstate and intrastate components.[67] Under this standard, the Commission clearly has sole jurisdiction over IP-enabled, IP-routed communications, which are inseparably interstate because of users' global mobility and the lack of any correlation between telephone numbers and geographic locations. But those same arguments do not hold true for all circuit-switched traffic. In the absence of evidence that the interstate and intrastate components of circuit-switched traffic are inseparable, Verizon and BellSouth invite the Commission to jettison a clear statutory path to unified intercarrier compensation reform under the Commission's interpretation of Sections 251(b)(5) and (g), for an uncertain path based on inseparability.

The Commission should decline Verizon's and BellSouth's invitation to tie its own hands simply to rectify Verizon's and BellSouth's long history of strategic mistakes with respect to reciprocal compensation.[68] The Commission and the D.C. Circuit have reasonably interpreted Section 251(b)(5) as applying to all telecommunications traffic not specifically carved out by Section 251(g). Likewise, the Commission and the court view Section 251(g) as a temporary transitional measure under which the Commission may

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67 *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45 ¶ 20 (rel. Feb. 19, 2004).

68 As the Commission is aware, the CLECs initially advocated "bill and keep" reciprocal compensation, which the ILECs opposed. The ILECs did not advocate "bill-and-keep" for any traffic until ISP-bound traffic terminated by CLECs increased. Many ILECs still do not advocate "bill and keep" for traffic for which they are net recipients of compensation, such as non-ISP-bound reciprocal compensation and exchange access.

supersede pre-existing rules and bring additional traffic within the scope of Section 251(b)(5). The Commission should maintain this interpretation.

CONCLUSION

The Commission must reject Verizon's and BellSouth's plea to resurrect the "local"/"long distance" distinction as a basis for determining the scope of Section 251(b)(5). As the Commission concluded in its *ISP Remand Order*, Section 251(b)(5) governs all telecommunications traffic, except where traffic is expressly governed by Section 251(g). The D.C. Circuit held in *WorldCom* that Section 251(g) does not govern the exchange of ISP-bound traffic in the absence of a pre-existing rule, and the Commission concluded in its *ISP Declaratory Ruling* that such a rule did not exist.

Verizon and BellSouth have provided no basis for revisiting those conclusions yet again. Were the Commission to do so all the same, it could cripple its own efforts to develop and implement a uniform intercarrier compensation mechanism to govern the exchange of all telecommunications traffic.

Respectfully submitted,

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ISP-Bound Traffic (and Other Locally-Dialed Traffic To an Information Service Provider) is "Telephone Exchange Service"

Calls to locally-assigned NPA-NXX codes are "telephone exchange service."

- The "ESP exemption" was a classification decision finding that Enhanced Service Providers (now "Information Service Providers") are "classified as end users for purposes of the access charge system," *Access Charge Reform*, First Report & Order, 12 FCC Rcd. 15982, 16134 (¶ 348)(1997), -- "no different from a local pizzeria or barbershop." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409 (D.C. Cir 2002).

- "Telephone exchange service" is defined as either "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment or other facilities (or combination therefore) by which a subscriber can originate and terminate a telecommunications service."

- Indisputably, a call from a calling party to a pizzeria or barbershop that purchases a local business line in the area "covered by the exchange service charge" is "telephone exchange service." It is a call from one end user to another "within a telephone exchange, or within a connected system of telephone exchanges" with the call "covered by the exchange service charge."

- Under the ESP classification as an "end user," a call from a calling party to an Internet Service Provider (or other Information Service Provider) that purchases ISDN-PRIs or other state-tariffed business services from the ILEC within the same area "covered by the exchange service charge." It is also a call from one end user to another "within a telephone exchange, or within a connected system of telephone exchanges" with the call "covered by the exchange service charge." This is true even if the ISP then cross-connects the ISDN-PRI to a long-haul private line to carry the communication to a distant server.

- The same is true when the Internet Service Provider (or other Information Service Provider) purchases its business service from the CLEC rather than the ILEC. The call is still a call from one end user to another "within a telephone exchange, or within a connected system of telephone exchanges," or a "comparable service," with the call "covered by the exchange service charge."

- The addition of the alternative definition of "telephone exchange service" as "comparable service provided through a system of switches, transmission equipment or other facilities (or combination therefore) by which a subscriber can originate and terminate a telecommunications service" – which was added by the 1996 Act – makes clear that "telephone exchange service" is not tied to the ILEC's exchanges or even the use of an "exchange" at all. As the D. C. Circuit has explained, "the Commission may characterize as 'exchange service' even services that, like CMRS, do not use exchanges." *GTE Service Corp. v. FCC*, 224 F.3d 768, 775 (D.C. Cir. 2000).

- The Commission recognized that ISP-bound traffic is "telephone exchange service," in *General Communication Inc. v. Alaska Communications Systems Holding, Inc.*, 16 FCC Rcd. 2834, 2848 (2001), *aff'd in relevant part and rev'd in unrelated part, ACS of Anchorage Inc. v. FCC*, 290 F.3d 403 (D.C. Cir. 2002). In that case, an ILEC's argued that the Commission cannot require ILECs to separate costs related to ISP-bound traffic to the intrastate jurisdiction because the Commission had exercised jurisdiction over such traffic as jurisdictionally mixed (*i.e.*, containing both interstate and intrastate communications, and therefore within the Commission's Section 201 jurisdiction). The Commission explained that, when an ILEC originates traffic bound to an ISP, "the 'operation at issue here is local exchange service, of which ISP services are a part pursuant to the ESP exemption. Local exchange service is provided under intrastate tariffs." *Id.* In that decision, "local exchange service" can only be synonymous with the statutory term "telephone exchange service."

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October 4, 2004

EX PARTE – Via Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92; *Core Communications, Inc. Petition for Forbearance*, WC Docket No. 03-171

Dear Ms. Dortch:

On October 1, 2004, Christopher Wright and John Nakahata, on behalf of Level 3 Communications, met with Austin Schlick, Deputy General Counsel, Jeff Dygert, Chris Killion and Nick Bourne, all of the Office of the General Counsel, and Tamara Preiss, Chief, Pricing Policy Division, Wireline Competition Bureau, with respect to the above captioned proceeding. This letter summarizes the points made during that discussion.

1. Traffic exchanged between a LEC and another telecommunications carrier bound for an Internet Service Provider falls within Section 201. When viewed on a traditional "end-to-end" basis, such traffic is jurisdictionally mixed and therefore falls within the Commission's jurisdiction over interstate services under Section 201(a), as the Commission has concluded on multiple occasions. *See Implementation of the Local Competition Provisions in the Telecommunciations Act of 1996; Intercarrrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3690 (1999) ("*ISP Declaratory Ruling*")("After reviewing the record developed in response to these requests, we conclude that ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."), *rev'd and remanded on other grounds, sub nom., Bell Atlantic v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic*"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, 9181 (¶¶ 52-66)(2001)("*ISP Remand Order*"), *rev'd and remanded on other grounds, sub nom., WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002)("*WorldCom*"). This conclusion was not overturned by the Court in either *Bell Atlantic* or *WorldCom*. However, as discussed below in both of those cases the court rejected the Commission's conclusion that the exchange of ISP-bound traffic between a LEC and another telecommunications carrier falls outside Section 251(b)(5).

2. ISP-bound traffic exchanged between a LEC and another telecommunications carrier also falls within Section 251(b)(5), which places on all local exchange carriers "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." Any conclusion to the contrary is highly likely to be overturned on appeal.

A. The Commission's own definition of "termination" under Section 251(b)(5) provides that ISP-bound traffic is terminated by the LEC serving the ISP. Rule 51.701(d) states, "For the purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office or equivalent facility and delivery of such traffic to the called party's premises." 47 C.F.R. 51.701(d). Rule 51.701(a) makes clear that "the provisions of this subpart apply to reciprocal compensation for the transport and termination of telecommunications traffic between LECs and other telecommunications carriers." 47C.F.R. 51.701(a). "Reciprocal compensation" is the title of Section 251(b)(5).

The application of these definitions in the context of the exchange of ISP-bound traffic is straightforward. The carrier serving the ISP, usually a state-certified Local Exchange Carrier, is clearly a "telecommunications carrier." Its customer is the ISP. Under longstanding Commission precedent, the ISP is an end user, not a carrier. *See e.g., Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16134-35 ¶ 348 (1997) ("We therefore conclude that ISPs should remain classified as end users for purposes of the access charge system.") The carrier serving the ISP provides the "switching of telecommunications traffic at the terminating carrier's end office or equivalent facility," which may include soft switches, and "deliver[s] . . . such traffic to the called party's premises." The D.C. Circuit recognized as much in *Bell Atlantic*: "Calls to ISPs appear to fit this definition: the traffic is switched by the LEC whose customer is the ISP and then delivered to the ISP, which is clearly the 'called party.'" 206 F.3d at 6.

No proponent of a theory that ISP-bound traffic is not "terminated" by the CLEC delivering traffic to the ISP has provided any explanation of why Rule 51.701(d) does not govern. Shockingly, in presenting its arguments in three separate ex partes that ISP-bound traffic does not "terminate" at the ISP, Verizon and BellSouth never analyze, discuss or even cite Rule 51.701(d) – even though that rule was specifically cited by the D.C. Circuit as part of its basis for overturning the Commission's 1999 conclusion that ISP-bound traffic did not terminate at the ISP. In so doing, Verizon and BellSouth commit the same mistake the Commission did in the *ISP Declaratory Ruling* – and for which the D.C. Circuit reversed in *Bell Atlantic*: equating jurisdiction with "termination" under Section 251(b)(5). Even if *Bell Atlantic* did not formally hold that "termination" occurs when the CLEC delivers traffic to its ISP customer (rather than remanding, *inter alia*, for failure to clearly explain why termination does not occur when the CLEC delivers traffic to its ISP customer, consistent with the Rule 51.701(d) definition), failure to address Rule 51.701(d) for a second time would be a clear ground for summary reversal.

In any event, Rule 51.701(d) cannot be distinguished by (erroneous) assertions that it defines only the elements for which compensation is to be paid, such as to limit reciprocal compensation for termination to the traffic-sensitive costs of the switch. In fact, that is not the purpose of Rule 51.701(d). Rule 51.701(d) was adopted in a portion of the 1996 *Local Competition Order* specifically entitled, "Definition of Transport and Termination." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* First Report and Order, 11 FCC Rcd. 15449, 16009 (1996) ("*Local Competition* Order"). The purpose of that section was to define specifically which functions were encompassed with "transport" and which functions were encompassed within "termination," and how those functions would be distinguished from traditional access services provided to long distance carriers. *See id.* at 16012-16016 (¶¶ 1033-1040). Within that section, Paragraph 1040 of the *Local Competition* Order, virtually identical to Rule 51.701(d), specifically stated: "We define 'termination,' for purposes of section 251(b)(5), as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises." The pricing rules that specifically limited compensation to the traffic-sensitive costs of the switch were adopted and discussed in a separate section of the order, entitled "Cost-Based Pricing Methodology," in which the Commission specifically discussed and applied the "additional costs" standard of Section 252(d)(2) of the Act, and did not analyze the definition of "termination" in Section 251(b)(5). *Id.* at 16024-5 (¶ 1057) (" We find that, once a call has been delivered to the incumbent LEC end office serving the called party, the 'additional cost' to the LEC of terminating a call that originates on a competing carrier's network primarily consists of the traffic-sensitive component of local switching.") Paragraph 1040 and Rule 51.701(d) do what they say they do: define "termination" under Section 251(b)(5).

Verizon's and BellSouth's actual arguments that ISP-bound traffic delivered by a CLEC to its ISP customer does not "terminate" at the ISP fail for the reasons set forth in the letter of David Lawson to Marlene Dortch, Secretary, FCC, dated September 8, 2004, on behalf of AT&T, MCI, Sprint and Level 3. We incorporate those arguments herein by reference.

We also explained that should the FCC adopt a "no termination" theory for ISP-bound traffic, it could dramatically curtail its ability to adopt a uniform intercarrier compensation regime that includes IP-network terminated VoIP. Take the example of a cable system that offers its subscribers cable-based IP-telephony, but only at their homes. Further assume that the cable operator is not itself a carrier, but has contracted with a CLEC (such as Level 3) to manage the "back office" functions and to interconnect its customers with the PSTN. In that case, under Verizon's and BellSouth's view of "termination," there would be no terminating carrier: although Level 3 would be providing the end office switching (or its functional equivalent) and delivery of the call to its end user customer – the non-carrier cable company – Level 3 would not be deemed to be providing termination because the traffic continued beyond Level 3 through the cable operator's CMTS to the cable operator's customer. In addition, however, there would also be a strong argument that, when the calling party was in the same state as the cable company's customer, the traffic was wholly intrastate, and thus outside of the FCC's jurisdiction under Section 201. *See California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) (holding that a wholly intrastate enhanced service remained within state jurisdiction pursuant to Section 2(b)). In that scenario, the FCC would be left with no statutory authority over such traffic.

Accordingly, there is no basis for concluding that ISP-bound traffic does not "terminate" for the purposes of Section 251(b)(5), when the CLEC delivers traffic to its ISP customer – precisely as stated in Rule 51.701(d) and paragraph 1040 of the *Local Competition Order*. The Commission can and must conclude that the delivery of such traffic to the ISP is "termination."

B. Verizon's and BellSouth's argument that Section 251(b)(5) should be limited to traffic exchanged between LECs proves nothing. See Verizon/BellSouth Further Supplemental White Paper, filed September 27, 2004, at 8. When ISP-bound traffic, originated by an ILEC from its end user customer, is delivered to a CLEC, which in turn delivers that traffic to its ISP customer, such traffic is traffic exchanged between two LECs, within the scope of Verizon's and BellSouth's purported limitation. In any event, Verizon and BellSouth are wrong. As the Commission recognized in its *Local Competition Order*, and codified in Rule 51.703(a), Section 251(b)(5) encompasses transport and termination of telecommunications between a LEC and any other telecommunications carrier. 47 C.F.R. 51.703(a). Verizon's argument would exclude transport and termination provided, *inter alia*, by CMRS carriers from the scope of Section 251(b)(5). Accordingly, this argument provides no legally sustainable basis for excluding ISP-bound traffic from the scope of Section 251(b)(5).

C. Verizon's and BellSouth's argument that Section 251(b)(5) is limited to the exchange of "local" traffic is wrong, and would repudiate the Commission's 2001 interpretation of Section 251(b)(5). As Level 3 described in further detail in its ex parte dated June 23, 2004, Sections 251(b)(5) and 252(d)(2) Govern ISP-Bound Traffic and Are Not Limited to Local Termination (attached hereto), the Commission would face substantial litigation risk should it now re-adopt an interpretation that Section 251(b)(5) was limited to "local" traffic. Moreover, as also discussed in that Level 3 ex parte, such a construction would unnecessarily tie the Commission's hands with respect to intercarrier compensation reform, particularly with respect to intrastate access charges. The Commission's 2001 interpretation – that Section 251(b)(5) applies to all telecommunications traffic, but that, nonetheless, exchange access compensation is temporarily preserved by Section 251(g) – is a legally sound reading of the Act. Accordingly, this argument likewise provides no legally sustainable basis for excluding ISP-bound traffic from the scope of Section 251(b)(5).

D. Verizon's and BellSouth's only remaining argument for excluding ISP-bound traffic from Section 251(b)(5) is that *any* traffic that falls within Section 201 must be excluded from Section 251 pursuant to Section 251(i). *See* Verizon/BellSouth Further Supplemental White Paper, filed September 27, 2004, at 8. This argument is fatally overbroad, and therefore incorrect.

In the first instance, Verizon and BellSouth are advancing an argument that Commission counsel disclaimed in its *WorldCom* brief – that Section 251(i) is a sufficient grant of authority to override the provisions of Section 251(b)(5) and 252(d)(2). In the Petitioners' brief in *WorldCom*, the CLEC petitioners had attacked the *ISP Remand Order* for, in their view, relying on Section 251(i) to exempt ISP-bound traffic from Section 251(b)(5). Brief of the Federal Communications Commission, *WorldCom Inc. v. FCC*, Docket No. 02-1218, at 44. In response, the FCC stated, "Contrary to the premise of the CLEC's argument, however, section 251(i) has no direct role in the Commission's interpretation of section 251(b)(5) . . . The Commission relies on section 251(i) solely for its continued authority to regulate Internet-bound traffic (which *otherwise* is exempted from section 251(b)(5) pursuant to section 251(g)) under its general regulatory jurisdiction over interstate communications set forth in section 201." *Id.* (emphasis in original). At oral argument, Mr. Rogovin further clarified, "I don't think that we're saying that 251(i) is a sufficient grant of authority to allow us to go forward and resolve this case in the face of 251(b)(5)." Oral Argument transcript at 37, attached to the Letter of Donna Epps, Vice President Federal Regulatory Affairs, Verizon, to Marlene Dortch, Secretary, FCC, dated May 26, 2004, CC Dockets No. 96-98 and 99-68 (filed May 26, 2004). Verizon and BellSouth are asking the Commission now to do exactly what the Commission's counsel said it wasn't doing in the *ISP Remand Order* -- to use Section 251(i) to override the otherwise applicable terms of Section 251(b)(5).

Furthermore, the overbreadth of Verizon's and BellSouth's argument is evident when examined outside of the narrow issue of intercarrier compensation for ISP-bound traffic. Under Verizon's and BellSouth's reasoning, any time that Section 201 and Section 251 address the same facilities or services, Section 251(i) would mandate that Section 201 applies and that Section 251 does not. This would lead to patently absurd results, such as:

- A state commission could not, in arbitration, order physical interconnection between an ILEC and a requesting telecommunications carrier pursuant to Section 251(a) or 251(c)(2) if the interconnection was for the purpose of interconnecting the networks to handle jurisdictionally interstate traffic. Instead, such interconnection could be ordered by the FCC only under Section 201(a).

- Because the FCC had jurisdiction over 25% of loop costs under Section 201 prior to the 1996 Act, Section 201 would apply to the rates for 25% of the loop costs and Sections 251 and 252 would apply to the rates for the intrastate 75% of loop costs.

- If a CLEC used an unbundled loop with its own DSLAMs to provide DSL service, solely because the CLEC was using that loop for Internet access, an interstate service, *GTE Telephone Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd. 22466 (1998), the unbundled loop would no longer be subject to Section 251, but would be subject only to Section 201.

- In any instance in which the Commission, in its ongoing Triennial Review proceeding, finds that a CLEC is impaired without access to unbundled switching, Section 201 would apply to all uses of unbundled switching to handle interstate traffic, while Section 251 would apply to all uses of unbundled switching to handle intrastate traffic.

Moreover, under Verizon's and BellSouth's theory of the scope of Section 251(i), the Commission's jurisdiction would not be optional, but mandatory. In other words, the Commission could not conclude – as it did in 1996 with respect to CMRS traffic – that although the traffic fell within the FCC's jurisdiction, states would, in the first instance, address such traffic under Sections 251 and 252. Verizon and BellSouth argue that the states have no jurisdiction under Sections 251 and 252 whenever the FCC has Section 201 jurisdiction. Under Verizon/BellSouth's interpretation of Section 251(i), the FCC, therefore, would be statutorily required to establish permanently a parallel system to set the rates, terms, and conditions for all interstate interconnection, unbundled network elements, and intercarrier compensation.

Verizon's and BellSouth's interpretation of Section 251(i) therefore reads Section 251(i) to wholly disrupt the statutory scheme for interconnection, unbundled network elements and reciprocal compensation set forth in Section 251 and 252. As such, it cannot be a legally sustainable construction of Section 251(i), nor a basis for excluding ISP-bound traffic from the scope of Section 251(b)(5).

E. Accordingly, the most legally sustainable conclusion is that ISP-bound traffic falls within *both* Section 201 and Section 251(b)(5). The D.C. Circuit suggested as much when it declined to vacate the *ISP Remand Order* because of a "non-trivial likelihood" that the Commission could reach similar results "under § 251(b)(5) and 252(d)(B)(i)." *WorldCom*, 288 F.3d at 434. If the Commission stubbornly persists in ruling that ISP-bound traffic is outside Section 251(b)(5), despite the language of Section 251(b)(5), the Commission's own definition of termination, and the lack of any legally sustainable basis in the record for excluding ISP-bound traffic, it will once again face reversal on appeal.

3. As set forth more fully in Level 3's ex parte letter dated September 13, 2004, when both Sections 201 and 251(b)(5) apply, the Commission, pursuant to Section 251(i), retains the authority to set prices for reciprocal compensation, but it is not required to do so. Such a reading harmonizes both Sections 251(b)(5)/252(d)(2) and Section 251(i). If Section 252(d)(2) is read to preclude the FCC, under any and all circumstances, from setting reciprocal compensation rates for traffic falling within Section 201 and 251(b)(5), that would appear to contradict Section 251(i)'s preservation of the Commission's pre-existing authority under Section 201: Section 252(d)(2) would be "limit[ing] or otherwise affect[ing] the Commission's authority under section 201 of the Act." 47 U.S.C. § 251(i). However, the Commission is not required to set such prices, and may defer to state rate setting in arbitration pursuant to Section 252(d)(2), or to voluntary agreements negotiated between carriers pursuant to Section 252(a)(1). To give meaning both to Sections 201 and 252, however, the Commission would be required to set prices in accordance with the substantive standards set forth in both sections.

A. When traffic falls within both Sections 201 and 251(b)(5), the approach most immune from legal challenge would be for the FCC to adopt rules governing the methodology for establishing reciprocal compensation rates under the additional cost standard in Section 252(d)(2)(A)(ii), and for the states to set those rates in arbitration when the parties cannot themselves agree on a rate. This is precisely the scheme that was adopted by the Commission in the *Local Competition Order*, with respect to CMRS traffic over which the Commission also had jurisdiction pursuant to Section 332. 11 FCC Rcd. at 16005 (¶ 1023). And this approach was upheld by the Supreme Court in *AT&T v. Iowa Utility Board*, 525 U.S. 366 (1999)("*AT&T*").

B. When the Commission, however, believes that it has important policy reasons to do so, it can set rates for traffic that falls within both Section 201 and 251(b)(5). Reading Section 251(i) to preserve the Commission's pre-1996 rate-setting authority under Section 201 gives meaning to both Section 251(i) and Section 252(d)(2). Under Section 252(d)(2), the states can set rates for interconnection, unbundled network elements, and reciprocal compensation, without respect to traditional jurisdictional boundaries, when presented with a dispute in arbitration, although the state must do so in accordance with any FCC-prescribed methodology. However, in the case in which the Commission chooses to exert its authority under Section 201, the Commission has parallel jurisdiction to set such rates with respect to interconnection, network elements, and reciprocal compensation that is also within its traditional Section 201 jurisdiction over interstate and foreign communications. The Commission recognized as much when it acknowledged that Sections 332 and 201 provided it with the basis for jurisdiction to set LEC-CMRS interconnection rates (including reciprocal compensation rates). *Local Competition Order*, 11 FCC Rcd. at 16005-6 (¶¶ 1023). But the Commission has no jurisdiction, other than its ability to establish pricing methodologies, with respect to interconnection, network elements, and reciprocal compensation for traffic that lies outside its Section 201 (or Section 332) jurisdiction over interstate and foreign (or CMRS) traffic.

Clearly, to avoid unnecessary legal issues and for reasons of comity, the Commission should not seek to displace state rate-setting under Section 252 in the absence of compelling public policy reasons to do so. The Commission followed that approach in the *Local Competition Order,* when it it declined to exercise its rate-setting jurisdiction over LEC-CMRS interconnection under Sections 201 and 332, in favor of allowing such rates to be set pursuant to Section 251 and 252. *Local Competition Order*, 11 FCC Rcd. at 16005-6 (¶¶ 1023-25).

Neither the Supreme Court's decision in *AT&T, AT&T v. Iowa Utils. Bd.,* 525 U.S. 366 (1999) ("*AT&T*") nor the Eighth Circuit's subsequent *Iowa II* decision, *Iowa Utils. Bd. v. FCC,* 219 F.3d 744 (8th Cir. 2000) ("*Iowa II*") considered the Commission's authority to step in to set prices with respect to those network elements or services that were under the Commission's jurisdiction pursuant to some section other than Sections 251 and 252. Indeed, what was at issue in both cases was the Commission's authority to establish a pricing methodology for network elements and services that the Eighth Circuit had held in *Iowa I* were not interstate or foreign within the FCC's section 201 jurisdiction, but instead were predominantly intrastate.

The Supreme Court's discussion of state rate-setting authority in *AT&T* is spare, and not on point here. In *AT&T,* the Court rejected respondents' arguments that the FCC's pricing standards constituted the "establishment of rates" in violation of Section 252(d). Instead, the Court reached the reasonable conclusion that the establishment of a pricing methodology did not constitute the establishment of rates. 525 U.S. at 384. The Court was not considering, nor was it asked to consider, whether the FCC could, under circumstances not specifically presented in that case, set rates for services or network elements that fell within Section 201 and Section 251.

Similarly, when the Eighth Circuit vacated the Commission's default proxies in *Iowa II* as impermissible FCC rate setting, *Iowa II,* 219 F.3d at 756-57, it was not considering whether such proxies fell within sources of Commission rate-setting authority outside of Sections 251 and

252. To the contrary, the default proxies applied to network elements that would have been considered intrastate under an end-to-end jurisdictional analysis. In that context, it is not at all surprising that the Eighth Circuit vacated what it viewed as FCC actions to set intrastate rates. Under Level 3's interpretation of Section 251(i), the Eighth Circuit would still have vacated the FCC's pricing proxies as applied to all interconnection, network elements and reciprocal compensation.

Accordingly, interpreting Section 251(i) to preserve the FCC's rate-setting jurisdiction with respect to reciprocal compensation arrangements within the scope of both Sections 201 and 251(b)(5) harmonizes all parts of the Act, and is not precluded by *AT&T* and *Iowa II*.

C. Although the Commission has jurisdiction to set rates for reciprocal compensation arrangements that fall within both Section 201 and 251(b)(5), it must do so (and, in any event, prudently should do so) in accordance with the substantive pricing standards in Section 252(d)(2).

Under Section 201, rates for interstate services must be "just and reasonable." "A basic principle used to ensure that rates are 'just and reasonable' is that rates are determined on the basis of cost." *MCI Telecommunications Corp. v. FCC,* 675 F.2d 408, 410 (D.C. Cir. 1982). And while, under Section 201, the "FCC is not required to establish purely cost-base rates," "[t]he Commission must, however, specially justify any rate differential that does not reflect cost." *Competitive Telecom. Ass'n v. FCC*, 87 F.3d 522, 529 (D. C. Cir. 1996)("*CompTel*"). Indeed, in *CompTel*, the D.C. Circuit reversed the Commission's transport rules because the Commission had never justified why it retained the Residual Interconnection Charge, a non-cost-based element, as part of its transport rate structure. *Id.* at 532.

Section 252(d)(2)(A) likewise requires that charges for transport and termination pursuant to Section 251(b)(5) be "just and reasonable." 47 U.S.C. § 252(d)(2)(A). That section, however, further clarifies that "just and reasonable" in the context of services falling within Section 251(b)(5) means, *inter alia*, that such rates "provide for the mutual and reciprocal recovery of each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier;" and "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." *Id.* Section 252(d)(2)'s substantive pricing standards elaborate what Congress considered to be "just and reasonable" rates in the context of reciprocal compensation.

The Commission cannot, therefore, simply ignore Section 252(d)(2)(A)'s substantive pricing standards in setting "just and reasonable" rates for reciprocal compensation under Section 201. To do so would suggest that the same service, covered by two statutory provisions, would be subject to different substantive pricing standards depending upon whether the state was exercising rate-setting authority under a "just and reasonable" standard pursuant to Section 252(d)(2)(A), or the Commission was setting a "just and reasonable" rate under Section 201. While the Act may be a "model of ambiguity or indeed even self-contradiction," *AT&T*, 526 U.S. at 860, this level of contradiction would be too much. There is simply no reason to believe that Congress intended its definition of "just and reasonable" for transport and termination rates to be limited to state-established transport and termination rates rather than FCC-established transport and termination rates.

In any event, it is imprudent for the Commission to set out to create a statutory conflict between the meaning of "just and reasonable" under Section 201 and "just and reasonable" under Section 252(d)(2). The Commission cannot go wrong legally if it uses the Section 252(d)(2) standards to guide its determination of "just and reasonable" rates for the same service under Section 201.

D. Because the Commission has not found that its \$0.0007/minute rate cap on ISP-bound intercarrier compensation is related to costs, it can justify maintaining that cap under either Section 201 or Section 252(d)(2) only as a transitional or interim measure, while it completes its intercarrier compensation reform proceedings. However, in a variety of contexts, and particularly in matters of intercarrier compensation, the courts have long upheld the Commission's authority to take reasonable transition measures needed to protect the industry from sudden disruption. *See e.g., CompTel v. FCC*, 309 F.3d 8, 15 (D.C. Cir. 2002) ("Avoidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule," *citing, MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984), and *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410 (D.C. Cir. 2002)); *CompTel v. FCC*, 117 F.3d 1068, 1073-75 (8^{th} Cir. 1997)(upholding the FCC's transitional imposition of some access charges on interconnection and UNEs provided under Section 251(c)(2), (3)).

The \$0.0007/minute rate cap has been in effect only since 2003, and by its terms was intended to continue until at least mid-2004. The extension of this transitional cap for another year while the Commission considers further the issues raised in its *Intercarrier Compensation NPRM, Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, 16 FCC Rcd. 9610 (2001) ("*Intercarrier Compensation NPRM*"), can hardly be considered an abuse of discretion. This is especially true because, according to trade press reports, the Commission has been working on a further Notice of Proposed Rulemaking, and the Commission is about to receive the Intercarrier Compensation Forum proposal for comprehensive reform, which will provide the Commission with a detailed, integrated intercarrier compensation reform plan on which it can seek comment.

Substantively, there is little difference between retaining the \$0.0007 rate cap as an interim rule and forbearing from Section 252(d)(2)'s pricing standards on an interim basis, both pending completion of its intercarrier compensation proceeding. However, there is no record basis for the Commission to forbear *permanently* from Section 252(d)(2)'s pricing standards.

E. Furthermore, there is no basis in the record for the Commission to forbear from Section 251(b)(5) with respect to ISP-bound traffic. Among the factors to be considered under Section 10 is whether enforcement of a provision is necessary to ensure that the "charges, practices, classifications, or regulations" are "just and reasonable and are not unjustly or unreasonably discriminatory," and whether forbearance is in the public interest, including the effect of forbearance on competition. 47 U.S.C. § 160(a), (b). Forbearance from Section

251(b)(5) would potentially expose CLECs serving ISPs to ILEC abuses of market power, in violation of Section 10(a)(1) and (3).

In the *Local Competition Order*, the Commission concluded that Section 251(b)(5) prohibits ILECs from assessing origination charges on other telecommunications carriers. 11 FCC Rcd. at 16016 (¶ 1042)("We conclude that, pursuant to section 251(b)(5), a LEC may not charge a CMRS provider or other carrier for terminating LEC-originated traffic.") Forbearing from Section 251(b)(5) with respect to ISP-bound traffic might remove this crucial protection from CLECs serving ISPs. There is absolutely no basis for taking such action, which would harm competition, and allow ILECs to reestablish monopolies to serve ISPs. Such action cannot be reconciled with the *Local Competition Order*.

* * *

Accordingly, the Commission should conclude that ISP-bound traffic falls within both Sections 201 and 251(b)(5). To the extent that the Commission wishes to establish rates for the exchange of ISP-bound traffic between LECs, it should apply the pricing standards of Section 252(d)(2), except on a transitional basis to prevent sudden industry disruption. Alternatively, the Commission may defer to state rate-setting, subject to FCC pricing rules, under Section 252(d)(2).

Any other course of action carries substantial legal risks, and is likely to be overturned on appeal.

Sincerely,

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